

July 31st, 1758.

41

# INFORMATION

FOR

ALEXANDER Earl of *Galloway*, and the  
other Trustees for the Creditors of  
the deceased Captain *John Stewart* of  
*Phisgill*, Defenders,

29

AGAINST

*Agnes Steuart* of *Phisgill*, and *John Hawihorn* of  
*Overaries*, her Husband, for his Interest, Pursuers.

**B**Y Contract of Marriage, betwixt the said Captain *John Stewart*, then *John Coltrain* of *Drummorrel*, and <sup>June 8.</sup> <sub>1728.</sub> Mrs. *Christian Heron*, Daughter of *Patrick Heron* of that Ilk, he became bound, in contemplation of the Marriage, to infest her in a yearly Annuity of 600 Merks to be uplifted out of his Lands of *Drummorrel*; and, as he was then presumptive Heir of Tailzie to *Agnes Steuart*, his Aunt, in the Estate of *Phisgill*, it is provided, that, in case he should, at any time, during the Marriage, succeed to that Estate, then the Lands of *Drummorrel* should be disburdened of the above Annuity, and he should be obliged to infest his Spouse in an Annuity of 900 Merks, payable out of the Estate of *Phisgill*, in case of Children of the Marriage, and 1200 Merks in the Event of no Children.

A The

Oct. 19.  
1734.

The said *John Coltrain* did thereafter, upon his Aunt's Decease, succeed to the Estate of *Phisgill*, and made up his Title by Service and Infestment, in Terms of the Tailzie in 1732; and, in 1734, he granted a Bond of Provision, upon the Recital of his Contract of Marriage, and of the Tailzie, made by his Grandfather, of the Lands of *Phisgill*, whereby the Heirs were allowed to provide their Wives in competent Liferents, not exceeding a Fourth of the Free-rent, and not by Infestment of Annuity, so as the Fee of the Lands could be affected therewith: And that he was resolved to provide his Spouse in an additional Jointure, out of his Lands of *Drummorrel*, over and above her Liferent Provision of the fourth Part of the Free-rent of the Barony of *Phisgill*; his Intention being, that she should have a yearly Liferent of 1200 Merks, in case of Children, existing at his Decease, and 1500 Merks, in case of none. And therefore, he provides her to the fourth Part of the Free-rent of the Barony of *Phisgill*, and further obliges himself, to infest her in a yearly Liferent of the Sum of 500 Merks, upliftable out of *Drummorrel*, at least so much thereof, as, with the Fourth of the Rent of *Phisgill*, might compleatly make up her Liferent Provision, to the Amount of the said Sums of 1200 or 1500 Merks, in the respective Events before mentioned.

June 17.  
1668.

In virtue of this Liferent Bond of Provision, Mrs. *Steuart* was infest, both in the Lands of *Phisgill* and *Drummorrel*, and her Husband continued in the quiet and undisturbed Possession of the Estate of *Phisgill*, for a long time after. But, at the Distance of several Years, the said *Agnes Steuart*, Grandchild to *John Steuart* of *Phisgill*, by his Son *Robert*, brought a Process of Reduction, in name of *William Graham*, her Trustee of the Tailzie, made by her Grandfather, the Title of Captain *Stewart*'s Possession, upon the Footing of a Contract of Marriage, entered into betwixt her Grandfather and Grandmother, as far back as the Year 1668, whereby a small Part of the Lands, and the Conquest of the Marriage, was provided to the Heirs of the Marriage.



Marriage. And, in this Reduction, she prevailed, and was found intitled to the Estate of *Phisgill*, as Heir of the Marriage. July 15. 1743.

The said Captain *John Steuart* was thereafter killed in his Majesty's Service, in the Action at *Preston*. And, after his Death, *Mrs. Steuart*, his Relict, brought a Proces against the Tenants of *Phisgill*, upon her *Liferent-infeftment*, which was opposed by *Mr. and Mrs. Hawthorn*, in respect that her Husband's Right had been reduced by the Decreet 1743: But the Cause having been reported to your Lordships, and thereafter heard in Presence, your Lordships found, *That the Obligation, entered into by John Coltrain of Drunimorel, afterwards John Steuart of Phisgill, in the Marriage-settlement, betwixt him and Mrs. Christian Heron, the Pursuer, whereby he was bound to settle upon her a Liferent-provision, to the Extent of 50 l. Sterling yearly, was onerous, on the Part of the said Christian Heron, and rational on the Part of the said John Coltrain, alias Steuart; and that he having implemented the same, by granting the Liferent-infeftment to that Extent, when he was in the Right of Fee and Property of the Estate of Phisgill, and his Right subject to no Challenge, from any thing that did, or could appear upon the Records, that Infeftment was likewise just and onerous, and does subsist in her Favours, notwithstanding of the Reduction, afterwards brought, of the Right and Title of the said John Coltrain, upon the latent personal Obligation, contained in the Contract of Marriage, entered into, in anno 1668, betwixt John Steuart, Writer in Edinburgh, and Agnes Steuart, his Spouse, whereby he was bound to settle the Estate he should acquire, in Favour of the Heir whatsoever of the Marriage; and, notwithstanding the Decreet, obtained in that Reduction, setting aside the Right of the said John Coltrain, which the Lords found cannot hurt the said onerous Liferent-settlement, made to Christian Heron, the Pursuer, by her said Husband, while he stood in the full Right of Property of the Estate, conform to the Infeftment and Investitures thereof.*

Against

Against this Interlocutor the said *Agnes Steuart* and her Husband preferred a long reclaiming Petition, but without Success: And thereafter they carried on an Appeal against it to the House of Lords. But your Lordships Decree was affirmed, and, in consequence thereof, Mrs. *Steuart* has drawn her Life-rent to the Extent of 50 *l. Sterling*, out of the Estate of *Phisgill*, and the remaining 300 Merks out of her Husband's paternal Estate of *Drummorrel*.

The said Captain *John Steuart*, having contracted Debts above the Value of his paternal Estate of *Drummorrel*, which amounts only to the Sum of 97 *l. 15 s. Sterling*, of yearly Rent, executed a Disposition of the said Lands in favour of the Earl of *Galloway*, and other Trustees, with Power to them to sell the same for Payment of his Debts; and the Trustees have accordingly sold the Lands, and the Purchasers are taken bound, by the Articles of Roup, to retain as much of the Price in their own Hands, as will be sufficient for answering Mrs. *Steuart*'s Life-rent-annuity of 300 Merks secured upon these Lands; and the Price will not be sufficient to pay Captain *Steuart*'s Debts, unless the Trustees succeed in making out some other Claims they are insisting for, as due to the Captain, which still remain in Dependance undetermined.

The said *Agnes Steuart*, and her Husband Mr. *Harwhorn*, have brought an Action against Captain *Steuart*'s Children, and the Trustees for his Creditors, setting forth the Contract of Marriage 1728, and Bond of Liferent Provision to his Wife, with her Infestment 1734, with the Decree of Reduction 1743, and Mrs. *Steuart*'s Decree of Preference for her Life-rent of 50 *l. Sterling* in 1749, and subsuming, that the Defenders, as representing Captain *Steuart*, should be decerned and ordained to free and disburden the Pursuer's Lands of *Phisgill*, from Payment of the Relict's Annuity of 50 *l. Sterling*, contained in her Bond and Infestment 1734, and to repeat to them so much of the said Annuities as have been paid since  
Captain

Captain *Steuart's* Death, and to make Payment of the same in Time coming.

When this Process came in, Captain *Steuart's* Children denied all Representation of their Father. So the only Question was with the Trustees, whose Duty it was to oppose this Action, as intended to carry off a great Part of the Fund, already too scrimp for Payment of the Creditors. And for them it was pleaded, that this small Liferent was lawfully imposed by Captain *Steuart* upon the Lands of *Phisgill*; that he kept far within the Powers allowed him by his Grandfather's Tailzie, which was then the only apparent Settlement of the Estate; and as it had been already found a proper and effectual Deed to exclude the Pursuer's Title, notwithstanding her subsequent Reduction, there lies no Action of Repetition against Captain *Steuart*, or his Creditors, on account of a Liferent to which his Wife was justly provided, out of an Estate which the Captain at that time, and for several Years after, possessed without any Challenge.

The Lord *Auchinleck Ordinary*, has taken the Debate to report, and appointed Parties to give in Informations.

The Lords will remember, that the Title, upon which the Pursuer prevailed in the Reduction 1743, was a Contract of Marriage executed by her Grandfather, above seventy Years before, *viz.* in 1668, by which he became bound to provide to his Wife in Liferent, the half of all Lands, Heritages, Goods and Gear, &c. then pertaining to him, or which he should happen to conquer during the Marriage, and to provide the Fee of the whole to the Heirs to be procreate of the Marriage.

As *John Steuart* did not apprehend, that he was tied down farther than to leave his Estate to descend among the Issue of the Marriage, he did expedite a Charter of his Lands, under the Great Seal, in the Year 1703, in favours of the Heirs-male March 30. of his Body, by which they were preferred to the Heirs whatsoever; and though this Charter was, for ever after, the Title 1703. of

of his Possession, yet it was never challenged by the Pursuer, the Heir of Line of the Marriage, until the late Reduction, which was terminated in the Year 1743.

The said *John Steuart*, not doubting of his Powers to settle his Estate amongst his own Issue, who were all descended of the Marriage 1668, did thereafter make an Entail, by which the Estate is limited to the Heirs-male of his Body, whom failing to the Heirs-female of his Body, without Division, excluding the Pursuer, the Daughter of his Son *Robert*, then deceased.

June 6,  
1719.

May 20,  
1720.

Nov. 6.  
1727.

June 8,  
1728.

After *John Steuart's* Death, his Son *William Steuart* was served Heir of Tailzie, and infest in the Estate.

And after his Death, *Agnes Steuart*, his eldest Sister succeeded, and made up her Titles as Heir of Tailzie; and as she was unmarried, and advanced in Years, her Nephew Mr. *Coltrain*, afterwards Captain *Steuart*, had a very near Prospect of the Succession, which could only be disappointed by his predeceasing her; and, upon the Faith of that, entered into the above Marriage, and obliged himself, upon his succeeding, to provide his Lady in a Liferent of 50*l. Sterling* out of the Estate of *Phisgill*; and some Years after, when he succeeded to his Aunt, he implemented his Obligation, by infesting her in the tailzied Estate, and also infest her in his paternal Lands of *Drummorrel* in a farther Annuity, to make up her Liferent to be 1200 Merks, in case of Children, the Event which has happened, in virtue of which she draws 300 Merks a-year out of these Lands.

It cannot be contested, that in every View this Liferent was *rational*, and even *moderate*: It was not so large as might have been expected, in Retribution of the Tocher brought by the Lady, which was the Sum of 9000 Merks *Scots*: And it was also considerably less than what he was entitled to grant by the Tailzie, which was the *fourth Part* of the Rent of the Lands, amounting to 4000*l. Scots per annum*, whereas this small Annuity does not extend to one *Sixth* of the

the *free Rentis*; and while the tailzied Estate is not burdened with the *Half of a Terce*, his paternal Estate is burdened with a separate Annuity, which extends near a *Terce* of these Lands, to the Exclusion of his other Creditors.

There is therefore not the smallest Appearance in this Case, of any sinister View in Captain *John Steuart*, to do any *tor-  
tious Act*, to the Prejudice of the Heirs, who might succeed to the Estate of *Phisgill*, or indeed, that he had any Appre-  
hension, that he was to be excluded by other Heirs from the Possession of that Estate: He was called by a Tailzie, up-  
on which two successive Heirs had before made up Titles, by  
Service and *Infestment*, and possessed during their Lives, with-  
out any Challenge. The first Charter of the Estate, taken  
in 1703, by *John Steuart*, who had purchased the same, did  
also proceed upon the same Plan, in favour of *Heirs-male*, ex-  
clusive of the Pursuer's Title, under the *Contract of Marriage*;  
and yet the Estate had been always possessed under that Title,  
without any Objection; nor was there any thing on Record,  
that could suggest the smallest Exception against it.

And therefore, Captain *Steuart* had no Reason to suspect any Danger when he was making up his Titles, in pursuance of so many Investitures; and indeed, of the *whole Investitures* that had ever been taken by his *Grandfather*, who was the *undoubted Proprietor*, as he had fairly purchased the Lands with his own Money: And as he had no Suspicion of any Danger, so he took no Precautions to guard against it: He did not exercise his Powers to the utmost, as if the Estate had been to go away from him to another, but kept far within the Bounds of what the Tailzie allowed him to give, or of what the Estate he succeeded to, might reasonably afford; and therefore, it is with great Justice, that your Lordships Decree in 1749, found, that the Obligation entered into by him, in his Marriage Settlement, to provide his Wife in a *Liferent*, to the Extent of 50*l. Sterling* yearly, was not only *onerous* on her Part, but also *rational* on his own Part; and

as

as this Decree was, upon the Pursuer's Appeal, affirmed by the House of Lords, it is hoped they will not now contest, what was there finally determined.

The Question then is, upon what Foundation this *rational* and *lawful* *Act* of Captain John Steuart's, far within the Bounds of the Powers given him by his Title, the only Title known to the Estate at the Time, can subject him or his Heirs, or his Creditors, to a Claim of Damages. Had his Relict succeeded to a *Terce* of the *Lands*, in which he stood infest by his *Decease* before the Challenge brought, as her *Terce* must have been sustained to exclude the Pursuer upon the same Grounds that your Lordships sustained her Liferent Infestment, so it does not appear that the Pursuer could have had any Pretence to claim Relief or Repetition of the Rents so drawn by the Relict, from her Husband's Heirs, however opulent they had been; far less to compete with his onerous Creditors upon such Claim of Damages. Whoever lies out from prosecuting their Right, must submit to the necessary Consequences of such Delay. The Loss of the Rents during the Possession had under the Title liable to Challenge, and the Establishment of such Rights as may naturally arise from that Title and Possession, are all natural Consequences that can hardly miss to happen in such Cases. And every one who leaves another in quiet Possession is bound to know that such Consequences may result from the Delay. If the Right grafted on that of the Possessor is established by Law, as *Terce* or *Courtesy*, it cannot be pretended that the Possessor is liable in Relief. And the Creditors are

*but however rational* *so as to secure* *the wife in her jointure* *thereby excluded*.

*What was chiefly urged upon the other Side, was, " That Drummond ofofice* as the Estate has been found by your Lordships Decree in *Jointure due out* 1743, to belong to the Pursuer, it was unwarrantable in *Captain Steuart* to impose any Burden upon it, and he must *falls to be now imposed* " repair

*where it was due originally*  
*besides the additional 300 £ lib*  
*found to be due to the wife*  
*as there was no jointure of her*  
*it failed on behalf of the heirs*  
*bound, but his heirs are bound*  
*to relieve the burden & waste of the additional possession*

“ repair the Damages thence arising: That though the Life-rent granted to his Wife was sustained by the Decree 1749, “ in respect of the Marriage and her *bona fides*, yet that does “ not relieve him from the Obligation of disincumbering the “ Pursuer’s Estate of a Burden to which it ought not to have “ been subjected, in the same Way as if he had borrowed “ Money and granted an heritable Bond, the Bond might “ have been effectual to the Creditor, and he nevertheless been “ bound to repair the Damage to the true Proprietor: That the “ Case of a Terce does not apply, as the Terce could not have “ taken place when Captain *Steuart* was denuded of the Lands “ in his own Lifetime.” And it was further said, “ That “ Captain *Steuart* must be presumed to have known of the “ Contract of Marriage 1668, which was in the Charter “ Chest of the Family. And therefore he was in *mala fide* “ to grant this Liferent-right, and upon that Ground also “ must be liable to repair this Damage.”

But here the Pursuer takes more for granted than can be made out from the Decree she obtained in 1743, when she supposes that she is to be held as Proprietor of the Estate at the Time that her Cousin Captain *Steuart* granted the Life-rent Infestment to his Wife in 1734. It is plain that Captain *Steuart* was at that Time the only Person who could be said to have the Property of these Lands, or intitled to exerce any Act of Property thereupon. He was infest upon Precept from the Chancery, proceeding upon a special Retour, as Heir in the Estate to *Agnes Steuert* his Aunt, who was in like Manner infest therein as Heir to *William Steuert* her Brother; and he again was infest as Heir of Tailzie to *John Steuert* his Father, who stood infest upon the Charter he expedie under the Great Seal in the Year 1703.

This Charter, as it proceeded upon the Procuratories granted to *John Steuert* by his Authors, from whom he had bought the Lands, and who had disponed them to him in Fee-simple, without any Limitation, was apparently as good a Title of

Property as any Man can acquire to Lands in this Country. And this Right of Property was fully transmitted by him to his Heirs of Tailzie, barring the Limitations he imposed upon them, which were not transgressed by Captain *Steuart* in the Liferent granted to his Wife. And therefore it must be admitted, that Captain *Steuart* was in 1734 the true Proprietor of the Estate, pointed out by all the successive Investitures that had ever been taken of these Lands, from the Time they were originally acquired by his Grandfather from the Families to which they formerly belonged, and that the Deeds granted by him, in Consistency with his Title under the Entail, did properly affect the Estate. Nor was there any other Person who was intitled to grant Infestments or impose Burdens upon it at the Time.

The Ground upon which the Pursuer afterwards evicted the Lands in 1743, was not a *preferable Title of Property*, as she would now suppose; or that it was understood, as if Captain *Steuart*'s Right had proceeded *a non habente*. But the Ground was, that her Grandfather *John Steuart* was understood to be limited by his Contract of Marriage 1668, to provide the whole Lands, he should acquire, to the Heirs of the Marriage. And, upon this *personal Obligation*, the Tailzie he made in 1719, under which Captain *Steuart* had succeeded, was reduced.

But, when the Question of the Lady's Liferent-infestment came afterwards to be considered in 1749, your Lordships were of Opinion, That although the Tailzie was reduced upon the Contract of Marriage, yet the Reduction could have no Effect *retro*; that Captain *Steuart* was truly the *verus dominus* of the Estate by all the Investitures, before his Right was brought under Challenge; and consequently, the Rights granted by him, during that Period, behoved to have the same Effect, as if the Challenge had never been brought, or had not succeeded.

It is therefore incumbent on the Pursuer to show, that the Ground of her Challenge is such, as ought to subject Captain *Steuart* in Damages, for the Deeds he lawfully exerted, in conformity to the Entail, which was his Title of Possession. Here the labouring Oar lies upon the Pursuer. As the Reduction does not operate *retro*, to avoid his anterior Deeds, as little will it be presumed to operate *retro* to his Prejudice, or to make him liable in a penal Claim of Damages, when he did no Wrong, but exerted a lawful Act, strictly agreeable to the Limitations of the Title, under which he openly possessed the Estate.

Suppose he had granted long Tacks at the old Rent, in Terms of the Tailzie, and the Pursuer, after she prevailed in the Reduction, had found, that she could get double Rent, if the Tacks were open; there is no Doubt, the Tacks would have been sustained, during the Period for which they were set, and thereby the Pursuer would have been deprived of a Part of the Profit she might have reaped from the Reduction, if she had brought it more early. But yet it seems impossible to maintain, that she could involve the Possessor in Damages, on account of a rational and lawful Act of Property, which he *exercised* at a Time, when no Challenge was brought of his Right.

The Case of borrowing Money is very different, there it might be said, that the Money was presumed to be still in his Hands, and he ought not to be allowed to retain it. But here your Lordships observe, there is nothing remains with Captain *Steuart*, in virtue of the Liferent-infeftment 1734; there is nothing that he has taken out of the Estate, in virtue thereof, which he or his Representatives can be called upon to restore. The Case is precisely the same, as if he had renewed Tacks to the Tenants at the old Rent, though the Pursuer might have suffered by the Lowness of the Rent, as well as by the Life-rent, yet, as the Profit, neither of the Tacks nor of the Life-rent, did accresce to Captain *Steuart*, but to third Parties, he cannot

cannot be liable in Damages to the Pursuer, from a lawful Act, which he exerted, while she acquiesced in his Possession, under a Title, confirmed by all the Investitures that had been taken of this Estate, from the Time it first came into this Family.

Nor is it any Answer to the Argument brought from the Case of *Terce* or *Courtesy*, that, in this Case, if Mrs. *Steuart* had relied upon a *Terce*, it might have been excluded by the Reduction obtained against her Husband in his own Life; that is merely accidental, and nowise affects the Principle upon which the Argument is founded, *viz.* That where a *Terce* actually takes Place, by the Death of the Husband, before Reduction, as the subsequent Reduction will not affect the Wife's Right, so neither will the Reducer have any Claim against the Husband's Heir, to relieve him of the Damage arising from the *Terce*. It is incumbent on the Pursuer, either to point out some Ground for such Claim, or to shew a substantial Difference betwixt a Right arising from the *Law*, in consequence of *Marriage*, and a *lawful rational Act* of the Husband, which behoved to be exerted in place of the *legal Right*, by the *Nature* of his *Titles*, and upon the Faith of which the *Marriage* was contracted.

The Pursuer has not as yet attempted to show either the one or the other. And indeed, the whole of this Claim appears, with Submission, to be a *Novelty*, without any *Precedent*. It often occurs, that the Right of a Possessor will be reduced on various Grounds, and notwithstanding thereof, Life-rents, and other Rights, derived from him will still subsist; and yet the Defenders know no Instance, where a Claim of Recourse of this kind has been thought tenible. In the ranking of the Creditors of the deceased *Samuel Maxwell* of *New-law*, your Lordships reduced a Disposition, granted by him, of certain Lands, to *Edward Maxwell*, his Son of a second Marriage, upon the *Act of Parliament* 1621; but thereafter, *Edward's Relict*, and her second Husband, insisted to be preferred

red upon a Liferent-annuity, granted to her by *Edward*, out of these Lands. It was objected by the Creditors, That her Right behoved to fall with her Husband's, upon the Rule, *resolutio jure dantis, &c.* But the Lord *Newhall Ordinary*, December 4th, 1736, Repelled the Objections made to the said Life-rent-right, and found, that she is to be ranked on the Lands contained in her *Infestation*, conform to its Date. *And his Lordship* having died in a few Days after, the Creditors reclaimed; but your Lordships unanimously affirmed the Interlocutor, though the *Annuity* claimed by the Relict exceeded two Thirds of the Rent of the *Lands*, and the Creditors acquiesced. They did not imagine, they had any Claim of Recourse against her Husband's Representatives, or separate Estate, although they came far short of Payment of their Debts, and were nowise disposed to pass from any Recourse, that was in Law understood to be competent.

Your Lordships will remember yet a later Case, that occurred in the Year 1739, where a Tailzie made by *Henry Macdougal*, of the *Lands of Mackerston*, in favours of *Heirs-male*, in the Year 1684, was insisted on as a Ground of Reduction of *Mrs. Macdougal's* Titles to that Estate; and your Lordships sustained the Defence of Prescription. But as that Point was thought very doubtful, by reason of intervening Minorities, a separate Defence was also pled for *Colonel Macdougal*, that the Liferent, granted to him by his Lady in his Contract of Marriage, ought, at any Rate, to be sustained, and your Lordships found, that the Contract was onerous, and behoved to subsist, notwithstanding the latent Tailzie 1684. Had it occurred to any of the Council in that Cause, that the *Heir-male* taking the Estate, with the Burden of *Mr. Macdougal's* Liferent, would have Recourse against his Lady, who granted it, and her Heirs: This was not a Point worth the disputing, as the Husband could be no better of prevailing in his Liferent, if it was to come off his own Heirs, by such Action of Recourse. But it was at that time thought an important Point

to be disputed by the Parties, and decided by your Lordships. This new Conceit, that is now broached by the Pursuer, had not then occurred, either to any of the Judges of the Court, or the Council at the Bar.

And indeed there is hardly a Case, where an Eviction happens of an Estate, where there will not remain some Deeds subsisting of the former Possessor; if not *Liferents*, at least *Tacks*, or some other Deeds from which the new Proprietor suffers a Loss; and yet there is no Instance condescended on, of an Action that was ever brought, for the Value of such Damage, against the former Possessor, or his Heirs: Which, at least, is an Evidence of the general Sense of the Nation, that a Possessor is not liable in a Claim of Damages, on account of Acts of Property exercised by him, which are, in Law, held to be effectual before his Title to the Property was brought under Challenge.

And in no Case can there be less Ground for stretching such a Claim, than in the present, where it can be proved, if necessary, as was laid before your Lordships in the former Process, that Captain *Steuart* laid out the whole of his Wife's Tocher, and further Sums which he borrowed, in the Improvement of this Estate; in inclosing and marling the Grounds, building an Addition to the Mansion-house, and large Office-houses, Garden-walls, &c, at a great Expence, which shews, at the same time, the Captain's sincere Belief of his own Right, and also, that the Pursuer has no Reason to complain of this small Burden, when she receives a greater Benefit from the Melioration of the Lands, than even the Loss which arises from this Incumbrance brought upon the Estate, during the Time she thought fit to delay her Action.

And as to what was said, " That one Double of the Contract of Marriage 1663 was in the Charter-chest of the Family, and therefore presumed to be known to Captain *Steuart*, and consequently he cannot be intitled to the Privilege of a *bona fide* Possessor, but must repair, to the utmost Extent,

“ Extent, every Damage the Pursuer suffers through this Burden brought upon her Property, whether he was actually a Profiter by it or not.” These Allegations, your Lordships will remember, were thrown out in the former Process, when the Pursuer was insisting for Repetition of the Rents against the Captain as a *mala fide* Possessor, but received Answers that were satisfactory to your Lordships at that Time. It is not alledged, that the Captain had any Access to the Charter-chest of the Family, at the time he entered into the Contract of Marriage in 1728, which is the Foundation of the Decree preferring the Relict to her Liferent. His Predecessor, *Agnes Steuart*, was then in Possession of the Writings, as well as of the Estate, and, consequently, he became bound to settle this Liferent at his Marriage, when he was in perfect Ignorance of any Claim the Pursuer could have to the Lands; and therefore, in every View, was *in optima fide* to give his Wife as great a Liferent as the Tailzie would permit.

2d, After he succeeded to *Agnes Steuart* in the Estate, it is no necessary Consequence that, because he had Access to the Charter-chest, therefore he would be careful to peruse every old Paper that was lying in it, for the Space of sixty or seventy Years back. This is rarely done by young Gentlemen who succeed to Estates, and are not bred to Business. And there is real Evidence in this Case, that he was ignorant of any Claim the Pursuer had under this Contract, else it cannot be imagined he would have laid out the great Sumis he did, in the Improvement of this Estate. No Man, in his Wits, would have done so, if he had suspected it was to be carried off by another.

3rd, If it were supposed, that the Captain had seen the Contract, before he granted the Infestment, 1734, of which there is not the smallest Evidence, yet the Creditors cannot see, that even that would affect them, in this Question. If he had read the Contract, he would have seen, that his Grandfather was obliged to provide the Conquest of the Marriage

to

to the Heirs: Whether the Lands of *Phisgill* were Conquest, during the Marriage, or not, did not properly fall within the Compass of his Knowledge, as these Things were all past long before he was born. And, if he had gone further, and made a diligent Enquiry into the Fact, it would not have occurred to him, that any Danger would thence arise to his Right. He would naturally think, that his Grandfather had fulfilled the Obligation in the Contract, intended to secure the Issue of the Marriage, when he made a Settlement of his Estate in Favour of the Children and Grandchildren, descended of the Marriage; and, that this Settlement having been acquiesced in, during the Course of three Successions, there was no Probability that such Challenge would be brought, after such a Distance of Time, while it stood in his Person.

Nay, if the Supposition were to be carried further, and beyond what was probable, in Favour of the Pursuer: If it were supposed, that Captain *Stewart* had not only perused the Contract, but had advised Lawyers upon it, he would not have found them clear of opinion, that the Tailzie would be reduced upon the Contract of Marriage. He must have been informed of sundry Judgments given by your Lordships, where you had found, that a Father was not so strictly bound, even by a Provision of a particular Estate to the Heir of the Marriage, but that he was at Liberty to settle his Succession upon a Child of the Marriage, who was not precisely the nearest Heir of Line, in the Course of Succession *ab intestato*. That such Settlements had been sustained, very recently, in many Cases, particularly, *July 10, 1724*, *James Douglas*, eldest Son of *Filliwhilly*, against his younger Brother, where a Settlement was sustained in which the *eldest Son* of the Marriage was *exhereditated*, without any Proof of Misbehaviour brought against him.—*January, 1736*, in the Case of the Heirs Portioners of *John Miln*, where a Settlement, made by a Father upon his *fourth Daughter* was found not reducible upon a Contract, providing the Lands to the Heirs thereof.—*January 7th, 1737*, *Trailk*.

*Traill contra Traill of Elsness*, where a Father, bound by his Contract, to provide his Estate to the Heirs *whatsomever of the Marriage*, made a Settlement upon his *second Son*, preferably to his *eldest Son's Daughter*; and this Settlement, very similar to what *John Steuart* made in the present Case, was sustained.

These Decisions were in the Case of particular Lands, provided by Contract of Marriage, where the Obligation on the Father is more strictly construed. But, in a general Provision of future Conquest, which it depends upon the Father to acquire or not, the Father's Powers have still been more extensively interpreted. In the Case, *July 7, 1698, Cummin contra Kennedy*, the Court found, that such Provisions limited the Father no farther than that he must dispose of his Conquest *intra familiam*, and sustained a Settlement made upon his *Grand-daughter*, passing by her Mother, who was his *Daughter*, and the *Heir of the Marriage*.—And even, as late as the Case of *Colonel Campbell's Children*, observed in the Dictionary, vol. 2. p. 290, decided *December 16, 1736, Campbells contra Campbells*, your Lordships will remember, that many able Judges were of Opinion, that such Provisions of Conquest did only import an *Obligation stirpi aut familiae*, to prevent the Father's prejudging the Issue of the Marriage, but left him at Liberty to settle his own Conquest amongst that Issue, as he should think fit; though the Decision given by the Majority did then, for the first time, construct the Father's Powers more strictly.

The Pursuer seemed to be much offended with the Decision, given by your Lordships, in Favour of Captain *Steuart's Relict* in 1749. She was pleased to say, “ That though she “ is bound to acquiesce in that Judgment as a *res judicata*, in “ the present Case, she will be allowed to doubt, if an In- “ stance can be produced, where the like was found, in any “ similar Case.” The Defenders have now removed that Doubt, by producing two Instances, where your Lordships had

given the like Judgments, in similar Cases. But though they will be far from complaining of any Judgment, given by this Court, yet they must sincerely acknowledge, that they do not know of any former Precedent, that found a Father so strictly tied by a general Provision of his future Conquest, that he was bound to give the whole to his eldest Son's Daughter, exclusive of the other Issue of the Marriage. And they are fully persuaded, that, if Captain *Steuart* had seen and perused the old Contract, 1668, as it does not appear he did, before he granted the Liferent Infestment, 1734, and asked the Council that now appear for the Pursuer, or any other Lawyer, whether, on account of any Challenge, that might arise on that Contract, he ought to decline to implement the Obligation in his own Contract, 1728, by granting the Liferent Provision to his Wife, he would not have been advised to decline it.

And therefore, it must appear to your Lordships, that nothing can be more extravagant or groundless than the Plea now urged on the Part of the Pursuer, as if Captain *Steuart* and his Representatives deserved to be punished, because he was *in mala fide*, in granting this Liferent-infestment. He had no Opportunity to see the Contract, 1668, when he came under the Obligation at his Marriage, in 1728, to grant this Infestment: There is no Evidence that he saw it before the 1734, when he granted the Infestment; and, if he had seen and perused it, he would neither have discovered the *Fact*, as to the Lands being Conquest, or the *legal Objection*, arising from it. Or lastly, if he had taken Advice, he never could have been advised upon such a doubtful Clause, where the Construction, in former Cases, had gone in his Favours, either to give up his own Right, which had, for so many Successions, remained unchallenged, or to decline Performance of the solemn Contract, upon the Faith of which his Marriage was agreed to: So that, in every View, this Act of Captain *Steuart* was lawful, fair, and rational, as your Lordships found by your

your Decree in 1749, and cannot subject him or his Representatives, far less his Creditors, in any Claim of Damages.

And it is the more extraordinary that the Pursuer should persist in repeating this groundless Clamour, that they cannot have forgot what Reception it met with, when formerly laid before your Lordships, in their Claim, brought against Captain *Steuart*, for Repetition of the by-gone Rents, uplifted during his Possession, if *mala fides* could have been inferred from a Party's maintaining a Possession descended to him from his Ancestors, by a *Series of Infectments*, until your Lordships should determine the Import of the Limitation, that was laid upon the Granter's Powers, by a general Clause in a Contract, it would have better applied to the Possession, maintained by Captain *Steuart* after the Process was raised, and the Contract produced, and the Foundation of the Pursuer's Claim made known to him. But when the Pursuers brought an Action for Repetition of the Rents, uplifted by Captain *Steuart* before the 5th January, 1743, the Date of the Interlocutor, reducing the Entail, and used Diligence upon it, your Lordships showed great Indignation at the Procedure, and discharged the Diligence; and therefore, it might have been expected, you would not have got the Trouble of hearing the same Objection against fair Deeds, executed by Captain *Steuart* in 1728 and 1734, when it does not appear, that he knew of this old Contract; and it is plain, from his After-conduct, that he had no Apprehension of any Challenge, arising from it.

The last Thing urged by the Pursuer was, " That what-  
" ever Defence might be pleaded against the Superplus Life-  
" rent, affecting the Estate of *Phisgill*, over and above the  
" 600 Merks originally charged upon the Lands of *Drummor-*  
" *rel*, yet the conditional Obligation to transfer that to the  
" Lands of *Phisgill*, in case he should succeed to that Estate,  
" which, if it means any Thing, must import a Succession  
" *de jure*, could never be available to relieve the Lands of  
" *Drummorrel* of that Burden, or to deny that Recourse  
" which is sought by the present Action."

The

This Objection seems to point at laying 300 Merks more of the Relief's Liferent upon *Drummorrel*, besides the 300 Merks which she already draws out of it, in virtue of her Infestment 1734, but the Creditors apprehend, without any Foundation: For it is plain, from the Contract of Marriage 1728, that the Liferent of 600 Merks, was not intended to be a Burden upon the Lands of *Drummorrel*, except singly in the Event of the Husband's Decease, before the Succession of the Estate of *Phisgill* opened to him: How soon that Succession devolved, the Lands of *Drummorrel* were free, and he was bound to infest her in the whole Liferent of 900 Merks, payable out of the Lands of *Phisgill*.

Here was a fair Agreement, such as every Heir would have made, in the like Circumstances; possessed of a small paternal Estate of 1000 Merks a-Year; but expectant Heir of Tailzie to a much larger one, it was natural for him to lay the Burden upon the tailzied Estate, which could best bear it, and to reserve the smaller Estate free, as a Fund for providing his Children: And, accordingly, he implements his Obligation, upon his Succession to *Phisgill*, and at the same time gave her 300 Merks of Addition, which she now draws out of the Lands of *Drummorrel*. Where then is the Foundation of transferring any Part of the Liferent, secured on *Phisgill*, over upon his paternal Estate? No such thing is mentioned in the Contract: The whole is provided to be laid on *Phisgill*, as it ought, so soon as he succeeds; and the Security stipulate for a smaller Liferent on *Drummorrel*, is only to take Place, in the Event of his Decease, before the Succession opened, an Event which did not happen.

And it is hardly necessary to make an Answer to the Puruer's Criticism, " That the Parties meant, by the Succession " to the Estate of *Phisgill*, a Succession *de jure*." It is plain the Parties could have no other Meaning, but that of the Succession opening to Captain *Steuart*, in terms of the Investitures, under which the Estate had been all along possessed.

The

The Succession did accordingly open, by the Decease of the Proprietor then infest, and Captain *Steuart* made up his Titles by Service and Infestment, on which he could have been compelled to implement his Obligation: He fairly did it without Compulsiture, and his Deed has been found effectual by your Lordships, and in the last Resort: So that as to this Deed, his Succession has had the same Effect, as if it had been brought under no Challenge; and there is no Pretence, from the Contract, to transfer any Part of that Liferent to *Drum-morrel*: The Security stipulated on that Estate, was only in the View of the Captain's predeceasing his Aunt, which did not happen: In the Event that happened, the whole 50*l.* was originally provided to lie upon *Phisgill*, and has been ultimately found an effectual Burden on that Estate.

And therefore, upon the whole, the Creditors are persuaded, that your Lordships will not approve of this Device, indirectly to defeat the Effect of your Lordships Decree, by which the Relict's Liferent was confirmed and ascertained as a rational Burden laid upon the Lands of *Phisgill* by Captain *Steuart*, when his Title to that Estate was acquiesced in by the Pursuer. There is no Instance where a Party who was allowed to be a *bona fide* Possessor, and not liable in Repetition of Rents, was yet found liable to warrant the Pursuer, who evicts the Lands, against the Consequences of the lawful Acts of Property, which fell to be exerted while he continued in Possession. These are Losses, which all Pursuers, in such Actions, must impute to the Account of their own Delay; and as no Act can be more lawful or commendable, than the granting a rational Liferent to a Wife upon Marriage, it is hoped it cannot be made the Foundation of Damages against Captain *Steuart*, or his Representatives, and still less to carry off the only Fund his Creditors relied on, for Payment of their just Debt.

*In respect whereof, &c.*

JA. FERGUSON.

